93-851

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

DARRYL BLACKMON,

Petitioner,

VS.

WAL-MART STORES, INC.,
d/b/a/ SAM'S WHOLESALE CLUB,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

I

WHETHER THE PROTECTIONS AFFORDED BY THE CIVIL RIGHTS ACT OF 1991 SHOULD BE APPLIED RETROACTIVELY TO CASES PENDING ON THE DATE THIS ACT BECAME LAW OF ITS OCCURRENCE.

PARTIES IN THE COURT BELOW

All parties in this matter are set forth in the caption of this case.

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The Petitioner, Darryl Blackmon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 27, 1993, affirming a judgment of the United States

District Court for the Southern District of Alabama. The opinion of the Court of Appeals is set out in Appendix A infra.

JURISDICTION

The Judgment of the Court of Appeals reversing the District Court's Judgment was entered on August 27, 1993. APP. A. The jurisdiction of this Court is found in 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves the Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat 107-1099.

STATEMENT OF THE CASE

Proceedings Below

The petitioner, Darryl Blackmon, filed an EEOC Charge of Discrimination against his employer, the Respondent, Wal-Mart Stores Inc. d/b/a Sam's Wholesale Club, on December 28, 1989.

Petitioner's charge alleged racial discrminiation by the Repondent's failure

to promote him and his subsequent termination on August 26, 1989.

Following receipt of his Notice of Right to Sue, Petitioner filed his lawsuit in the federal district court on February 10, 1992, alleging a violation of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, and 42 U.S.C. Section 1981.

On December 4, 1992, at a pretrial conference, Petitioner conceded, without agreeing, that the trial of this case should proceed without the benefit of the requested jury, in light of the district court's recent rulings in several cases that the Civil Rights Act of 1991 should not, and would not, be given retroactive application.

The case was tried on January 17, 1993, before the district judge sitting without a jury, and concluded on January 19, 1993, with the court taking the matter under submission.

By Order and Judgment dated February 1, 1993, the district court entered judgment in favor of the employer, holding that substantial evidence was not produced from which a factfinder could reasonably conclude that the employer intended to discriminate on the basis on race. This judgment was affirmed by the Eleventh Circuit in an unpublished opinion. App. at 1a.

Statement of Facts

Petitioner, a black male, had been employed by Sam's since April 1987, as a stocker in the grocery section of the warehouse.

Petitioner was terminated by the Respondent on August 26, 1989, and at the time his job title was stocker/forklift driver in the Hardlines department.

During Petitioner's tenure with the Respondent's warehouse, the store was managed Mr. Bert Ritter, and the assistant manager was Stewart Wortham.

The reason given Petitioner for his discharge was reduction of staff, and the exit interview form completed on Petitioner by Mr. Ritter at the time of his discharge, indicated that he was eligible for re-hire.

At the time of Blackmon was fired Charles Whatley, another employee in the hardlines department, was also laid off. Mr. Whatley, who was white, had only been in hardlines for approximately four (4) months, and he served as a stocker. Prior to his transfer to hardlines, Mr. Whatley had been a part time employee on the Respondent's janitorial staff.

Approximately two months prior to his terminnation, Blackmon expressed an interest in a supervisory vacancy in the hardlines department. Sam's had solicited a white employee for the vacancy, but due to her high absentee record, the position was not offered to her.

Mnagement never approached Blackmon

regarding his interest in the position, as was done with a white employee.

After Blackmon expressed concerns that he was not promoted due to his race, the position was "filled" by consolidating the hardlines department with another department, and using the present white supervisor for both departments.

REASON FOR GRANTING THE WRIT

THE MAIN ISSUE IN THIS APPEAL IS WHETHER THE PROTECTIONS AFFORDED BY THE CIVIL RIGHTS ACT OF 1991 SHOULD BE APPLIED RETROACTIVELY TO CASES PENDING ON THE EFFECTIVE DATE OF THE THE 1991 ACT.

Certiorari has granted in two cases involving the issue of the retroactive application of the 1991 Act, Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir.1992), cert. granted in part, 113 S.Ct. 1250 (1993), and Harvis v. Roadway Express Inc., 973 F.2d 490 (6th Cir.1992)

This case is one of many nationwide

that will be directly affected by this Court's ruling on the issue of retroactivity, and the reasons for granting the writ in Landgraf apply equally to this case. Petitioner's jury request and damages would be directly affected by the Supreme Court's ruling on this issue.

CONCLUSION

Considering the foregoing, petitioner respectfully requests that a Writ of Certiorari issue to review the August 27, 1993 judgmnt of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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November 26, 1993

APPENDIX "A"

THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DARRYL BLACKMON	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 92-0113-BH-C
WAL-MART STORES, INC. d/b/a/ SAMS'S WHOLE-SALE CLUB,	)	
Defendant.	)	

JUDGMENT

Pursuant to the Order entered simultaneously herewith, it is ORDERED, ADJUDGED and DECREED that judgement be entered in favor of Defendant Wal-Mart Stores, Inc., d/b/a Sam's Wholesale Club, and against Plaintiff Darryl Blackmon.

DONE this 1st day of February, 1993.

W. B. Hand
Senior District Judge

IN THE UNTIED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

DARRYL BLACKMON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. 92-0113-
	)	BH-C
WAL-MART STORES, INC.	)	
d/b/a SAM'S WHOLESALE CLUB,	)	
	)	
Defendant.	)	

ORDER

In accordance with the following Findings of Fact and Conclusions of Law, the Court enters judgment in favor of Wal-Mart Stores, Inc. d/b/a Sam's Wholesale Club.

FINDINGS OF FACT

The Plaintiff, Darryl Blackmon, is a black male and was employed as a stocker in the "hardlines" department of the Sam's Club in Mobile until August 25, 1989. The

manager of the Defendant Club is Mr. Bert Ritter, a white male, who has served as store manager in the Mobile facility since March or April, 1989. On December 12, 1989 Plaintiff filed a Charge of Discrimination against the Defendant with the Birmingham Regional Office of the Equal Employment Opportuntity Commission ("EEOC"). In the Charge of Discrimination, Plaintiff alleged racial discrimination as to his August 25, 1989 termination and racial discrimination relating to his on-the-job treatment by the Defendant. The EEOC did not find reasonable cause to substatiate the allegations of discrimination and issued Plaintiff a Notice of Right to Sue.

The Plaintiff's Complaint by statement of the parties limits his contentions to a claim that he was discharged because of his race in violation of the Title VII of the Civil Rights Act of 1964, as amended. The

triable issues include determinations of whether the Plaintiff was discriminated against based on his race because he requested a promotion and commented on racial overtones and harassment in the workplace. Further, a final issure is whether Plaintiff would have been terminated regardless of any alleged discrimination due to Plaintiff's poor work performance and economic factors allegedly procipating the reduction in force in which the Plaintiff was discharged.

The evidence in this regard shows that he was employed as a stocker, that his department and another department were consolidated, and that each department had a supervisor. When the departments were consolidated, one of the two supervisors became the supervisor for the consolidated department. Plaintiff alleges that he applied for the position which he thought was vacant as a result of Wal-Mart

terminating one of the supervisors. This is the promotion Plaintiff claims he did not get because of his race.

There was a reduction in force and some nine employees were released. Five of the terminated employees were white, three were black, and one was hispanic. Plaintiff alleges the lay-off was not for the purpose of economics but was a subterfuge to get rid of him in retaliation for his complaints.1 Mr. Ritter testified that Charles Long, Director of Operations for the region, stated that Mr. Ritter's payroll was too high and layoffs were necessary. Further, Mr. Ritter explained that he decided which individuals were to be laid off based almost exclusively on their productivity. No business records were shown to substantiate this contention, but likewise no evidence was inroduced by Plaintiff, who had the burden to prove that it was not so. Therefore, the Court

has no option but to conclude that the reasons for the reduction were legitimate.

The real issue is wheter or not rehiring was a product of racial discrimination. The plaintiff argues that they did not call him back and offer him the job when economic conditions improved because they knew he was interested in re-employment. To support this, he testified that, in 1991, several employees were called back and reinstated by management after having been laid off.

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1 The Court finds from the evidence that statistically the overall hiring practice of Wal-Mart at the Mobile store indicates a consciousness by Wal-Mart for a balanced hiring practice. The percentage of blacks employed far exceeds the percentage of blacks in the workforce in this area. Mr. Ritter testified that approximately 56 percent of the Mobile store's workforce is black and approximately 44 percent is white. The evidence also indicates that promotional practices by Wal-Mart in the Mobile store reflect ther is no restriction or discrimination as to blacks. The number of blacks holding managerial positions is proportional to their employment percentages. Therfore, the Court does not see any discrimination in this practice.

This conclusion is supported by the findings of the EEOC.

As to the persons actually recalled after the 1989 layoff, one black was recalled first and there is no evidence whether this person had called or filed an application for rehire. The other person recalled, a white, did fill out a written application. However, Plaintiff contends that the white rehiree filled out the applicaion only after being invited to do so by management. This is a credibility determination because management said the re-emloyed man frequented the store, continued to ask about re-employment and obtained and filled out an application.

The Plaintiff did not deny having knowledge of the requirement for filling out an application for re-employment. He simply relied on an alledged verbal statement indicating he was interested in re-employment. At no time did he file any

written application. Plaintiff argues that Wal-Mart reinstated two employees following a general lay-off of eight employees in December, 1991, without requiring written applications. However, these rehirings occurred two years after the Plaintiff was terminated and involved special circustances. These employees complained to the main offices of Wal-Mart and one of the people facsimiled a letter of complaint to the store's headquarters. As a result of these complaints and unique circumstances, Wal-Mart reinstated two of the employees. This action did not constitute a change in the official policy requiring the submission of written applications as a prerequisite to re-employment.

The Complaint registered by these employees was that they were improperly selected for discharge due to their length of employment. This was, as stated, called to management's attention in

writing. Consequently, management rehired two of the employees. There is no evidence that a similar condition existed in Plaintiff's case, or if it did that the issue was called to management's attention. The evidence showed that Plaintiff was an acceptable employee and was eligible for rehire. Plaintiff did not demonstrate that he would not have been rehired even if he had submitted a written application. In fact, each employee laid off was shown to have his or her faults but not of such a magnitude as to preclude rehire.

CONCLUSIONS OF LAW

1. The basic framework for ananlyzing "disparate treatment" cases such as this one, in which there is no direct evidence of discrimination, was established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

2. In the context of reduction-in-force cases, the Eleventh Circuit has held that a plaintiff establishes a prima facie case under the McDonnell Douglas-Burdine analysis

> by demonstrating (1) that he was in a protected [class] and was adversely affected by an employment decision; (2) that he was qualified for his current position or to assume another position at the time of discharge or demotion; and (3) evidence by which a fact finder might reasonabley conclude that the employer intended to discriminate on the basis of [an impermissible reason] in reaching the decision at issue.

Earley v. Champion International Corporation, 907 F.2d 1077, 1082 (11th Cir. 1990).

3. The Court has determined, and the Defendant agrees, that the first two elements of the Plaintiff's prima facie case have been met.

4. However, there is no substantial evidence from which a fact finder could "reasonably conclude that the employer intended to discriminate" on the basis of race in regard to Plaintiff's termination.

5. Further, even if the third element had been satisified and Plaintiff had established a prima facie case, the Defendant's justification evidence is sufficient for the court to find in its favor. As explained in Earley v. Champion International Corp., 907 F.2d 1077, 1081 (11th Cir. 1990):

> The inference of intentional discrimination raised by a plaintiff's prima facie case "may be stronger or weaker, depending upon the facts of the particular case." Grigsby, 821 F. 2d at 595. "To a large extent, of course, the strength of weakness of the inference of discrimination created by the employee's prima facie case defines the nature of the employer's rebuttal." See Meiri v. Dacon, 759 F.2d 989, 997 (2d Cir. 1985). In some cases, the defendant's evidence of a legitimate non-discriminatory reason for its actions may be so strong as to rebut completely the inference raised by the plaintiff's prima facie case. Grigsby, 821 F.d2 at 596.

6. Wal-Mart's rebuttal evidence, economic necessity in which the plaintiff was laid off after consideration of his lower productivity, constitutes sufficeint

justification evidence in light of Plaintiff's attempt to create an inferene of discrimination.

7. Plaintiff at no time presented evidence demonstrating that Defendant's rebuttal evidence was pretextual.

8. Plaintiff's allegation that he was discharged in retaliation for his complaints appears to be predicated on what is "sometimes referred to as "Titile VII's "opposition clause." Bigge v. Albertson's, Inc., 894 F.2d 1497, 1501 (11th Cir. 1990); see 42 U.S.C. 2000e-3(a).

9. To prove a prima facie case of retaliation under the opposition clause, a plaintiff must prove:

> (1) that there was a statutorily protected participation; (2) that an adverse employment action occurred; and (3) that there was a causal link between the participation and the adverse employment action.

Bigge, 894 F.2d at 1501 (quoting Simmons v. Camden County Board of Education, 757

F.2d 1187 1189 (11th Cir.), cert. denied, 474 U.S. 981 (1985) and Whatley v. Metropolitan Atlanta Rapid Transit Authority, 632 F.2d 1325, 1328 (5th Cir. 1980)).

10. "The first element is established if the plaintiff can show that he opposed an unlawful employment practive which he reasonably believed had occurred." Bigge, 894 F.2d at 1501. However, unfounded assumptions on the plaintiff's part are not sufficient. See Evers v. General Motors Corp., 770 F.2d 984, 986 (11th Cir. 1985). Plaintiff has not demonstrated that he reasonably believed an unlawful employment practice occurred, but rather, relies on vague allegtions of harassment.

11. Even if the court determined that Plaintiff reasonably believed the unlawful employment practices occurred, no evidence was presented to demonstrate that there was a causal link between the

participation and the adverse employment action. Management's explanation of the criteria for dismissal was sufficient and no showing was made by Plaintiff that Defendant's explanation was pretexual.

12. Pursuant to the above findings of fact and conslusions of law, the Court finds that the Plaintiff has failed to prove a prima facie case as to any of his claims. Further, even if the Plaintiff had proven a prima facie case on any claims, the Defendant has demonstrated sufficient rebuttal evidence for the Court to find in Defendant's favor.

It is so ORDERED.

DONE this 1st day of February, 1993.

W.B. Hand
Senior District Judge

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-6204
Non-Argument Calendar

D.C. Docket No. 92-0113-BH-C

DARRYL BLACKMON,

vs. Plaintiff-Appellant,

WAL-MART STORES, INC., d/b/a/
Sam's Wholesale Club

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and TUTTLE, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.